

1989

West Virginia Statute Regulating Funeral Industry Is Not Preempted by Federal Regulation and Does Not Violate the First Amendment

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Recommended Citation

Catherine M. Crisham *West Virginia Statute Regulating Funeral Industry Is Not Preempted by Federal Regulation and Does Not Violate the First Amendment*, 1 Loy. Consumer L. Rev. 102 (1989).

Available at: <http://lawcommons.luc.edu/lclr/vol1/iss4/6>

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PUBLIC UTILITIES (from page 101)

ance by 0.4% and Penn Power's annual allowance by 0.5%. Therefore, the overall impact of the rate orders was not confiscatory. The Court reasoned that the reduced rates would not undermine the financial soundness of either utility nor would the rates deprive individual investors of just compensation.

Duquesne and Penn Power asserted that the Act was inconsistent because the "used and useful" standard normally is associated with the fair value approach and Pennsylvania used the historical cost method. Duquesne and Penn Power argued further that the Act undermined the PUC's duty to balance the interests of the consumer and the investor. The Court rejected both of these arguments. Because the PUC is an arm of the state legislature it is competent to set utility rates. Furthermore, utility rates are not subject to attack merely because a combination of rate-setting methods are used.

The Court also rejected the contention that the historical cost rule should be adopted as the single constitutional standard. A public utilities commission need not follow any single standard

or combination of standards when setting rates. Such a rule would limit alternatives that may be beneficial to both consumers and investors. The Constitution provides broad guidelines wherein the state legislatures and utility commissions are free to decide the rates that best serve the interests of the public and the investors.

Concurring and Dissenting Opinions

Justices Scalia, White and O'Connor concurred. They noted that although the Constitution does not dictate a rate-setting method, the historical cost or prudent investment method should always be considered when assessing the constitutionality of the impact of a particular rate order.

Justice Blackman dissented. He believed the Court did not have jurisdiction to hear the case because there was no final judgment before the Court. The Pennsylvania Supreme Court had invalidated the rate orders set by the PUC and remanded the case for further ratemaking. Because no new rates had been set, the judgement of the Pennsylvania Supreme Court was not final.

Martha D. Owens

WEST VIRGINIA STATUTE REGULATING FUNERAL INDUSTRY IS NOT PREEMPTED BY FEDERAL REGULATION AND DOES NOT VIOLATE THE FIRST AMENDMENT

In *National Funeral Services, Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit held that a West Virginia statute regulating preneed funeral contracts was not preempted by the Federal Trade Commission's ("the FTC's") Funeral Rule. 16 C.F.R. 453 (1989). The court also held that the statute did not violate the right to free commercial speech guaranteed by the first amendment of the Constitution.

West Virginia Statute

In 1955, the West Virginia legislature determined that preneed funeral contracts were void unless all proceeds of the contract were placed in trust pending the contract beneficiary's time

of need. Since that time, the state legislature imposed increasingly strict regulations upon preneed funeral contracts. The current West Virginia statute ("the Act"), W. Va. Code § 47-14-1 (1983), encompasses all preneed sales of burial goods, funeral goods, and funeral services, and declares any contract void which is not solicited, drafted, and executed in accordance with the Act. The statute also requires that all sellers of such goods be licensed by the state and that all employees of a seller be certified by the state. The Act permits the advertisement of preneed funeral contracts. However, in an effort to reduce fraud and protect privacy, it prohibits two types of solicitation: 1) in-person or telephone solicitation of potential purchasers who are in nursing homes, hospitals, and private residences, and 2) any solicitation of relatives of persons near death. The Act regulates the terms of the sale by mandating that ninety percent of the contract proceeds be placed in a trust pending the contract beneficiary's time of need, and that stated procedures for the disposition of trust income be observed.

Under the Act, the seller is required to provide the agreed upon services at the contract price, regardless of whether the price of these services exceeds the amount in the trust at the time of need. However, if the actual services cost less than the proceeds in the trust, the seller must refund the difference. A purchaser may revoke the contract at any time, while the seller may revoke the contract for nonpayment only. The Act establishes a civil remedy for any breach of its provisions and criminal penalties for the mishandling of the proceeds of the contract.

Background

When National Funeral Services (“NFS”) entered the preneed funeral services market in 1980, the trust requirements of the West Virginia statute were not in effect because they had been ruled unconstitutional by a lower state court. In 1982, the West Virginia Supreme Court of Appeals reinstated the trust requirements. In 1983, the statute regulating preneed funeral contracts was amended to create the more comprehensive system currently in effect. After the statute was amended, NFS filed suit in federal court alleging that the Act was preempted by federal regulation. NFS also challenged the Act’s constitutionality, claimed the West Virginia Funeral Director’s Association and several individual funeral directors had committed antitrust violations, and sought an injunction to prevent the Act from being implemented. The antitrust claims were settled and the case proceeded to trial. The federal court upheld the statute against all of NFS’s challenges.

NFS appealed to the United States Court of Appeals for the Fourth Circuit. NFS contended that the FTC’s Funeral Rule regulates the funeral industry to such an extent that it preempts West Virginia’s regulation of preneed funeral contracts through the Act. NFS also contended that the state’s prohibition against in-person and telephone solicitation violates NFS’s right to free commercial speech guaranteed by the first amendment.

Statute Not Preempted by Federal Funeral Rule

The Fourth Circuit unanimously held that the Act was not preempted by federal regulation. The FTC’s Funeral Rule was enacted in response to the results of a nationwide FTC investigation of funeral practices. The investigation disclosed fraudulent sales practices throughout the indus-

try based on an unwillingness on the part of funeral directors to reveal prices of funeral goods and services. The court noted that the purpose of the Funeral Rule was to lower barriers to price competition in the funeral market and to reduce consumer fraud. The Funeral Rule requires that prices be disclosed to consumers who request price information over the telephone and that they be disclosed prior to a sale. The court emphasized that the Funeral Rule focuses on the at-need market, whereas the Act focuses on the preneed market.

The court made three specific inquiries in order to resolve the question of preemption. First, the court asked whether the federal regulation is so comprehensive that one can reasonably assume Congress did not intend concurrent state regulation. The court concluded that the Funeral Rule was not comprehensive. Instead, the Funeral Rule was limited in scope because it focused on particular fraudulent practices relevant to the disclosure of prices of funeral goods and services.

Second, the court considered whether the federal interest in the regulated industry is so dominant that it creates an assumption that state regulation is precluded. The court found that no preclusion of state regulation could be assumed. The Funeral Rule expressly states that if a state law applies to a sale also governed by the Funeral Rule, and the state law provides protection at least equal to that provided by the Funeral Rule, then the state law will govern in that state.

Lastly, the court inquired whether enforcement of the federal and state regulations would likely result in a conflict. The court found no possibility of conflict, emphasizing that the federal and state regulatory schemes have a common purpose: consumer protection. The extent of the Funeral Rule’s regulation of preneed contracts is the prohibition of unfair sales practices and the requirement of price disclosure. The Act similarly prohibits fraudulent sales techniques through its ban on solicitation of persons in nursing homes, hospitals, and private residences. The federal mandate that price information be disclosed over the phone applies only to consumers who request such information, and therefore, does not conflict with the West Virginia prohibition against unrequested telephone solicitation.

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FUNERAL INDUSTRY (from page 103)

Statute Held to be an Appropriate Restraint on Commercial Speech

NFS next contended that the West Virginia ban on uninvited in-person and telephone solicitation was an unconstitutionally broad, content-based prohibition, and therefore violative of the first amendment. A majority of the court upheld the Act but at the same time rejected the district court's reasoning that the prohibitions did not regulate the content of the solicitation. The district court had held that the prohibitions were permissible time, place, and manner restrictions. Time, place, and manner restrictions generally receive less scrutiny than content-based restrictions. The majority of the Fourth Circuit noted that the speech at issue was commercial speech and thus entitled to less first amendment protection than noncommercial speech. The majority determined that the prohibitions were in fact content-based but that, because the speech being regulated was commercial speech, the prohibitions in the Act did not violate the first amendment.

The court employed a four-part test, established in *Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York*, 447 U.S. 557, 563 (1980), to determine whether the content-based restriction in the Act was appropriate. The court first considered whether the speech concerned legal activity and whether it was misleading. The majority concluded that the speech was legal and not misleading. Second, the court considered whether the government interest in prohibiting the speech was substantial. Because funeral arrangements are made under difficult circumstances, the consumer's ability to make thoughtful decisions is reduced. The possibility of fraud is therefore increased. The court also noted the heightened government interest in protecting the privacy of the home against such solicitation due to the particularly sensitive subject of the transaction. Both government interests supported prohibiting the solicitation.

Third, the court considered whether the Act directly advanced the government interest in reducing fraud and protecting privacy. Because in-person solicitation provides great potential

for privacy invasion and fraud, the court concluded that the Act's ban on in-person solicitation directly advanced the government interest. The court also found that the ban on telephone solicitation directly advanced the government interest because the threats posed by telephone solicitation were similar to those presented by in-person solicitation. The court found both methods of solicitation dangerous. Unlike written solicitation, neither in-person nor telephone solicitation is open to public scrutiny and both are difficult to regulate.

Finally, the court considered whether the Act's prohibition was overly broad. The court stated that because commercial speech is afforded less protection than noncommercial speech, it is not necessary that the prohibition be the least restrictive alternative. The prohibition is not overly broad if it represents a reasonable means of regulation which is not excessive in view of the government interests. The court concluded that the Act's prohibition is not excessive. The Act seeks to prohibit only two limited forms of speech, permits alternative methods of solicitation, and advances a significant state interest.

Concurring Opinions

The first concurring opinion would have upheld the Act's prohibitions as valid time, place and manner restrictions rather than as valid content-based restrictions. The regulation of preneed funeral solicitation can be analogized to the regulation of attorney solicitation. The United States Supreme Court, in upholding bans on in-person solicitation by attorneys, did not subject the regulation to the stricter scrutiny required for content-based restrictions. Therefore, preneed funeral solicitation need not be subjected to this stricter scrutiny.

The second concurring opinion reasoned that the Act was not preempted by the Funeral Rule, but that the first amendment issue need not be decided. Because the trust provision of the Act had been upheld by the court, and enforcement of the trust provision would preclude NFS from operating in West Virginia, the first amendment issue was moot.

Catherine M. Crisham